

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA; AT KAMPALA
(LAND DIVISION)
CIVIL SUIT No. 005 OF 2014

FREDERICK KATO MAZINGA SERWANO ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES

OF KAMPALA ARCHDIOCESE::: DEFENDANT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The Plaintiff has brought this suit in his capacity as holder of letters of administration of the estate of his late father Asa Bakulumpagi, and as well heir to his late grandfather Serwano Mazinga. He accuses the Defendant (a trustee body for the Kampala Catholic Archdiocese) of trespass onto land comprised in Block 255 Plot 124, situated at Munyonyo, Kampala (herein after, the suit land), which he claims to be his. He therefore seeks a declaratory order that the suit land is his, and a permanent injunction against the Defendant. He also seeks an order directing the Commissioner Land Registration to deregister the Defendant from the title to the suit land, and substitute with his as proprietor. The Defendant denied these allegations; and raised a counterclaim against the Plaintiff for quiet possession of the suit land.

Counsels for the parties hereto filed a joint scheduling memorandum, wherein they proposed the following issues to Court, to enable it pursuant to the provisions of 0.14, r.5 of the Civil Procedure Rules to arrive at a just determination of the matters in controversy between the parties to this suit: –

1. Whether the Defendant fraudulently obtained title to the suit property.
2. Whether the Plaintiff has a legal claim over the suit land.
3. Whether the Plaintiff's claim is sustainable in law.
4. What remedies are available?

Counsels for the parties filed written submissions, with useful authorities, in support of the respective parties' case. I notice that the resolution of some of the issues proposed may well dispose of the other issues of the suit. In this regard, I deem it proper to deal with the 1st and 2nd issues together; after which, the 3rd issue would follow.

Issue No. 1: – Whether the Defendant fraudulently obtained title to the suit land.

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Issue No. 2: – Whether the Plaintiff has a legal claim over the suit land.

Authorities abound in our jurisdiction on the issue of fraud. In the much-acclaimed case of *Frederick J.K. Zaabwe vs Orient Bank Ltd. & 5 Ors, SCCA No. 4 of 2006*, Katureebe J.S.C (as he then was), who delivered the lead judgment of the Supreme Court, relied on the definition of fraud contained in *Black's Law Dictionary*, 6th Edn., at page 660, as follows: –

"... a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so he shall act upon its legal injury ... a generic term, embracing all multifarious means, which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and unfair way by which another is cheated ..."
(*emphasis added*).

It is incumbent on the Plaintiff to prove, on the balance of probability, that the Defendant acquired the suit property fraudulently. The most instructive authority in this regard, is the case of *Kampala Bottlers Ltd. vs Damanico (U) Ltd., S.C.C.A. No. 22 of 1992*, wherein Wambuzi C.J. amply elucidated on the guiding principle that Court should follow in order to determine whether or not fraud has been established; stating therein as follows: –

"... fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of it. ... further, I think it is generally accepted that fraud must be proved strictly, the

*burden being heavier than on a balance of probabilities generally applied in civil matters.
..."*

The evidence adduced in support of the Plaintiff's contention that the Defendant was guilty of fraud in its acquisition of the suit property, is contained in paragraph 10 of the sworn statement of Frederick Kato Mazinga Serwano (the Plaintiff), admitted in evidence, which is as follows: –

"(a) forging, influencing, being privy and or causing to be prepared a title with inconceivably strange entries in the Torrens system of land registration; showing illogical and suspicious entries as depicted in a letter from the Commissioner for Land Registration dated the 3rd day of September 2009, concerning the Defendant's title e.g that Namukasa Christina was given a certificate of succession by the Mengo Lukiiko in 1947 in respect of her purported father a one Yasoni Mbazira Kitamirike vide Succession Register No 10475, pursuant to paragraphs 6 of the letter. Strangely, under paragraph 5 of the same letter, the same Yasoni Mbazira Kitamirike who passed away in 1947, got registered in respect of the said property under Instrument No. KLA 39247.

(b) That on the title presented by the defendant depicts that Christina D. Namukasa [was registered] under instrument KLA 49732 on the 23rd day of March 1968. That this day, when cross checked, was a Saturday and as far as I know the Land Registry then was not transacting business over the weekends.

(c) That the defendant was negligent and or reckless and did not conduct a search on the suit property and or investigate the root title. Had it done so, it would have discovered that there was instrument of transfer from Serwano Mazinga to Yasoni Mbazira Kitamirike and the suspicious entries of Christina D. Namukasa.

(d) Purportedly presenting a fake title insinuating that the fictitious Christina D. Namukasa was the first proprietor, tthe title does not indicate from which Mailo Register Volume the Block land originates from like other Blocks.

(e) That it is also strange that the transactions as purportedly archived by the Commissioner for Land Registration paragraphs 2, 3, & 4, were not micro filmed and they occurred before 1961.

(f) *That the defendant concealed and or kept silent about the ownership of the suit property and misrepresenting that the same is owned by the defendant and later on writing a letter purportedly inquiring about the true ownership of the land that it has title to.*

(g) *That it is strange that the area of land is on the title presented by the defendant is in Hectares; yet it is public knowledge that land before 1991 was described in size in Acres and not Hectares. Land begun to be measured in hectares from 1991, onwards."*

The Plaintiff relies on the evidence of D/AIP Ojokit Abubaker (PW1), who claims to have investigated the Plaintiff's complaint to Police. He tendered a report dated 4th March 2014, admitted in evidence as ***exhibit PE1***, which he had submitted to M/s Opyene & Co. Advocates (lawyers for the complainant). Paragraph 3.1 thereof, discloses discovery of entries in the parent certificate of title as follows: on 28th June 1923, land comprised in MRV 243 Folio 24 Final Certificate No. 17704, measuring 7.41 Acres, was registered in the name of Serwano Mazinga, as the first registered proprietor. On 29th March 1940, Asa Bakulumpagi was registered as joint proprietor of the land; with Serwano Mazinga. However, Asa Bakulumpagi's interest was with regard to 3.41 Acres only; while Serwano Mazinga retained 4.00 Acres.

Paragraph 3.2 of the report, sets out the entries made on the title to the land, after the death of Asa Bakulumpagi, as follows: –

(a) *On the 13th August 1960, a one Semei Luganda was directly registered on the certificate of title under Instrument No. KLA 28237, as proprietor of the 4.00 acres formerly owned by Serwano Mazinga (deceased).*

(b) *The 3.41 Acres formerly owned by Asa Bakulumpagi (deceased) were directly transferred to James Kityo under Instrument No. KLA 49742 dated 23rd March, 1968. There is no evidence to show that James Kityo had letters of administration or Power of Attorney.*

(c) *On the 28th November, 1963 the 4.00 acres were transferred to Yasoni Mbazira Kitamirike under Instrument No. KLA 39247.*

(d) *On the 20th April, 1964 the 4.00 acres were transferred to Christine D. Namukasa allegedly a daughter to Yasoni Mbazira Kitamirike under Instrument No. KLA 40022.*

Paragraph 3.3 of the report, states that when the referencing of Mailo land was converted from 'Volume' and 'Folio', to 'Block' and 'Plot', the land hitherto comprised in MRV 243 Folio 24 Final Certificate 17704 was now comprised in Block 255; and, under Instrument 49742 dated the 23rd March 1968, it was divided into two plots. The 4.00 acres became Plot 124; while the 3.41 acres became Plot 125. On the 15th June 1983, Plot 124 was transferred from Christina D. Namukasa to the Registered Trustees of Kampala Archdiocese; under Instrument No. KLA 144012. Paragraphs 3.7, and 3.8, of the report shows that it was in 1983 when Mazinga Serwano Lukwajju Frederick learnt that his grandfather, Serwano Mazinga, had owned the land; upon which, he caused the search at the Land Registry that revealed the series of transfer of the suit land to the several persons named above.

However, during cross-examination, PW1 conceded the existence of an earlier report, also from his Department, on the very same investigation his report pertained to. The content of the earlier report dated 21st January 2014 is, apart from some few material exceptions, the same as the one PW1 tendered in evidence. The exceptions are that the earlier report, admitted in evidence as ***exhibit CE3***, was submitted to the Assistant Inspector General of Police, at C.I.I.D. Headquarters; while the latter report, admitted in evidence by PW1, was made to M/s Opyene & Co. Advocates. The earlier report names D/IP Alidipi Alex as the investigating officer, and it was forwarded by D/CP Kototy. However, the latter report names D/AIP Ojokit Baker as the investigating officer; without indicating there was any forwarding police officer at all.

Most significant, is the notable omission, in the latter report, of the crucial observation contained in paragraph 4.1 to 4.4 of the earlier report; which pointed out that the Commissioner of Land Registration had contradicted the information given to the police investigators by the Principal Registrar of Titles over the suit land. It is necessary to reproduce, the observation in the earlier report, here in extenso: –

"4.2 ... the Titles to Plots 124, 125 and the subdivisions subsequently made thereafter could have been fraudulently obtained after the death of Serwano Mazinga and Asa Bakulumpagi without any authority or consent of any of the Beneficiaries or before an Administrator of the Estate for either could be appointed.

4.3 ... there are no Instruments of Transfer in the Lands Registry and that Semei Luganda, Eri Morri Kimbowa Kiwanuka, Yasoni Mbazira Kitamirike and his purported daughter Christian D. Namukasa are all believed to be fictitious persons

created by unknown persons to defraud the bonafide Beneficiaries. It is due to this fact that neither M/s Mengo Teachers Cooperative Savings and Credit Society nor the Registered Trustees of Kampala Archdiocese were able to lead the Police to the persons mentioned above whom they alleged to have sold to them the respective Plots.

4.4 ... having concluded our inquiries, we found it prudent to return the certificate of Title to the Registered Trustees of Kampala Archdiocese in the form and content it was received from them at the time; and that until such a time when it will be required in Court as evidence." (emphasis added).

Admittedly, PW1 testified in Court that they were three Police officers who investigated the matter. However, the existence of the two reports, signed by different officers, raises the question as to who of the three investigating officers had authority to sign the report. To my mind, where an investigation is carried out by three officers, the most senior of them would sign the report thereon. In this case, PW1 was in fact the most junior of the three investigating Police officers; and yet he signed the questionable report made to the complainant's lawyers. Since the report made to the Police C.I.I.D Headquarters was signed by the most senior of the three investigating Police officers, and was made to the officer with the authority to determine the value or worth of the investigation, it seems to me that it is the official report.

Second, PW1's report, admitted in evidence as *exhibit PE1*, was deliberately doctored to purposefully omit paragraph 4 of the earlier report, *exhibit CE3*, containing crucial observation by the investigators on their findings with regard to the alleged fraud. Accordingly, PW1's report is highly suspect; and is, at the very least, of questionable probative value. PW1 also admitted, in cross-examination, that in the course of their investigation, they were availed the letter the Commissioner Land Registration had sent to the Administrator General, contained in the trial bundle admitted in evidence as *exhibit CE1*. The letter sets out the information, which forms the basis of the findings contained in paragraph 3, common to the two police reports admitted in evidence as *exhibit PE1*, and *exhibit CE3*.

This letter by the Commissioner of Land Registration clarified that the separate interests Asa Bakulumpagi and Serwano Mazinga had in the land hitherto comprised in MRV 243 Folio 24 Final Certificate 17704, were respectively alienated in 1959 and 1960. The interest of Serwano Mazinga was alienated to Semei Luganda from whom it was transferred to Yasoni Bazira in 1963; then it was transferred to Christina D. Namukasa in 1964. Both interests formerly held by

Sirwano Mazinga and Asa Bakulumpagi in the land comprised in MRV 243 Folio 24 Final Certificate 17704 were acquired by Christina D. Namukasa as the sole registered proprietor. In 1968, when Mailo land referencing had been converted from Volume and Folio, to Block and Plot, the land was subdivided into Plots 124 and 125 of Kyadondo Block 255; registered in the name of Christina D. Namukasa.

There is no indication on the certificate of title that Semei Luganda acquired the registered interest of Sirwano Mazinga after the death of Sirwano Mazinga. This is compounded by the Plaintiff's evidence that Sirwano Mazinga died in 1923; and yet his father Asa Bakulumpagi was registered in 1940 as joint proprietor with Sirwano Mazinga. On the evidence, the Plaintiff secured letters of administration for the estate of his late father, Asa Bakulumpagi, to whom Sirwano Mazinga's interest in the suit land had devolved, when the suit land no longer formed part of the estate of Asa Bakulumpagi. This is because Sirwano Mazinga's interest in the land had been alienated by Semei Luganda, then it passed to Yasoni Mbazira, from whom it passed to Christina D. Namukasa, and then finally to the Defendant, as shown above.

It could only have reverted to Asa Bakulumpagi's estate upon Court cancelling the transfers to the several persons, inclusive of the Defendant herein. This of course would be a tall order owing to the fact that the Plaintiff would have to prove that he, or his predecessor in title, was fraudulently dispossessed of the suit land; and, also, to convincingly prove either that the Defendant was complicit in perpetrating the fraud complained of, or was aware of it and took advantage thereof. The Plaintiff's evidence is that he learnt of his father's and grandfather's interest in this land, in 2007; long after it had been alienated. On the evidence, the Defendant commenced negotiations to acquire the suit land in 1973; and concluded the transaction in 1983 when it was registered as the proprietor thereof.

This was some forty–seven years after the land was alienated from the Plaintiff's grandfather as registered proprietor; and twenty–three years after the Defendant had acquired the land. There is no evidence that the Defendant knew, or had any dealings with, Semei Luganda who might have fraudulently alienated Sirwano Mazinga's interest in the land. On the evidence, Christina D. Namukasa, from whom the Defendant acquired interest in the suit land, was herself a third transferee of the land since its alienation by Semei Luganda who passed it to Yasoni Mbazira; thus making the Defendant the fourth transferee. Even if Christina D. Namukasa had fraudulently acquired the suit land, unless the Defendant had notice of such fraud, she would

still, on the authority of *David Sejakka Nalima vs Rebecca Musoke; C.A Civ. Appeal No. 12 of 1985*, have passed good title to the Defendant.

There is a host of authorities in support of this proposition of the law. In the case of *Ismail Jaffer Allibhai & 2 Ors vs. Nandlal Harjivan Karia & Anor; S.C. Civ. Appeal No. 53 of 1995. [1996] IV KALR 1*, Oder J.S.C. followed the decision in the *David Sejakka Nalima* case (supra), as well as the other cases cited therein by Odoki J.A. (as he then was), including the case of *Assets Company Ltd. vs Mere Roihi & Others [1905] A.C. 176*, where at p. 210 the Privy Council, considered statutory provisions similar to the ones in our Registration of Titles Act, and defined fraud as “*dishonesty of some sort*,”; and that to establish fraud, it must be attributable either to the registered purchaser or the purchaser's agents. On when the purchaser's actions might amount or point to fraud, the Privy Council clarified as follows: –

“The mere fact that he might have found out if he had been more vigilant, and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.”

There is no evidence adduced before Court that the Defendant had any reason to doubt that Christina D. Namukasa was the lawfully registered proprietor of plot 124. PW1 himself, one of the investigating officers, produced a certified copy of the certificate of title to Plot 124, from the white page, showing that Christina D. Namukasa was registered as proprietor of Plot 124. This certified copy of the certificate of title was admitted in evidence as exhibit CE2. Furthermore, the observation in paragraph 4 of the Police report, exhibit CE3, that the title to Plot 24 'could have been fraudulently obtained after the death of Serwano Mazinga and Asa Bakulumpagi', and further that the transferees of the suit land, including Christina D. Namukasa, 'are all believed to be fictitious persons created by unknown persons to defraud the bonafide beneficiaries' is quite revealing. (underlining added).

In effect, the Police report points no accusing finger at the Defendant. The choice of the words underlined above is an unmistakable concession that whoever perpetrated the alleged fraud, they claim the alienation of the suit land was clothed with, remains unknown. There is, thus, no way that the Defendant could, by whatever stretch or laxity of construction, be held complicit in, or

said to have had knowledge of, any fraud that may have been perpetrated in the alienation complained of. I need to point out here that the conclusion reached by the Police in their report, that the failure by the Defendant and other transferees to lead Police to Christina D. Namukasa meant she too was a fictitious person was baseless. The evidence adduced by Joseph Bernard Ssali, DW2, that for ten years they interacted with her leading to the conclusion of the transaction, is uncontroverted.

In any case, it is not a requirement of the law, or necessity such as prudence, that for the validity of the transaction to hold, a purchaser of land must keep track of the vendor after sealing the transaction of sale. That would be placing an onerous burden on purchasers of land. A purchaser of land need only establish that he or she is acquiring a clean and good title from the vendor. In the instant case, there was no evidence of any circumstance that would have aroused the Defendant's suspicion in their dealings with Christina D. Namukasa. The evidence adduced before Court to prove fraud, is quite wanting; and falls far short of the exceptionally high threshold of balance of probability required to prove alleged fraud; which is above the standard of proof required in other civil claims.

In the event, it is my finding that the Defendant acquired a good and indefeasible title to the suit land, as a bona fide purchaser without any knowledge or notice of whatever fraud that may have been perpetrated in the alienation of the suit land from its rightful owners. Owing to my finding that the suit land did not form part of the estate of the late Asa Bakulumpagi, when the Plaintiff obtained letters of administration for his estate, and, further, having found that no case of fraud has been established against the Defendant, I find it unnecessary to resolve the other issue framed for determination by this Court; as to do so would amount to indulging in a moot point. Accordingly, I therefore dismiss the suit with costs to the Defendant.

With regard to the counterclaim, I am satisfied on the evidence that the Defendant suffered inconvenience owing to the Plaintiff's adverse claim to the suit land. The Plaintiff lodged a caveat on the title to the land; and the police took away the certificate of title to the suit land, albeit that they later returned it to the Defendant. All this prevented, or delayed, the Defendant from the full use of the suit land. However, because possession remained with the Defendant all the time, and later, in the course of the trial, the Plaintiff agreed that the Defendant could proceed to the full use of the land, a sum of U. shs 5,000,000/= (Ten million only) is sufficient to atone for the loss suffered. Accordingly, I make the following orders: –

- (i). The Plaintiffs' suit is hereby dismissed with costs to the Defendant; and the Defendant's counterclaim is allowed with costs to the Defendant.
- (ii). The Defendant is the lawfully registered proprietor of Plot 124 of Kyadondo Block 255; as a bona fide purchaser thereof for value without notice of any fraud perpetrated thereon.
- (iii). A permanent injunction hereby issues restraining the Plaintiff from interfering with the Defendant's quiet possession of the suit land.
- (iv). The Registrar of Titles is hereby directed to vacate the caveat lodged by the Plaintiff on the title to the suit land.
- (v). The Defendant is awarded damages in the sum of U. shs 5,000,000/= (Ten million only).
- (vi). The remedial monetary awards in (i) and (v) herein shall attract interests at Court rate from the date of this judgment; till payment in full.



Alfonse Chigamoy Owiny – Dollo
JUDGE

25 – 08 – 2015